

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(NORTHERN DIVISION)**

POTOMAC NAVIGATION, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION No.:
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Defendant.	)	
_____	)	

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

Plaintiff, Potomac Navigation, Inc. (“POTOMAC”), by its undersigned counsel, brings this action against Defendant, United States Environmental Protection Agency (“EPA”), to compel compliance with the Freedom of Information Act, 5 U.S.C. §552 (“FOIA”), and in support thereof, POTOMAC alleges as follows:

**JURISDICTION AND VENUE**

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. §1331.
2. Venue is proper in this district pursuant to 28 U.S.C. §1391(e).

**PARTIES**

3. Plaintiff POTOMAC is a domestic entity incorporated under the laws of the State of Delaware having a principal place of business at North Locust Point, Baltimore, Maryland, with a mailing address c/o Semmes, Bowen & Semmes, Suite 1400, 25 South Charles Street, Baltimore, Maryland 21201.

4. Defendant EPA is an agency of the United States Government. Defendant has its principal place of business at Ariel Rios Building, 1200 Pennsylvania Ave., N.W. Washington, D.C. 20460. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

### **STATEMENT OF FACTS**

5. On August 22, 2008, Plaintiff sent a FOIA request to Defendant, via the internet seeking access to records concerning the preparation and towing of the LIBERTY SHIP ARTHUR M. HUDDALL from the James River Reserve Fleet to Greece.

6. On or about September 8, 2008, Defendant sent Plaintiff a letter acknowledging receipt of Plaintiff's FOIA request dated August 22, 2008. The letter stated that Plaintiff's request was forwarded to the Office of Pollution Prevention and Toxics for processing, and a reference number, HQ-RIN-02021-08, was provided.

7. Pursuant to 5 U.S.C. §552(a)(6)(A)(i), Defendant's response to the request was due on or before September 22, 2008. On or before that date, Defendant was required to determine whether to comply with the request and immediately notify Plaintiff of its determination, the reasons therefore, and the right to appeal any adverse determination.

8. Defendant failed to produce records responsive to Plaintiff's August 22, 2008 FOIA request on or before September 22, 2008, or claim that such records are exempt from production under 5 U.S.C. §552(b). It also failed to notify Plaintiff of any determination whether to comply with the request, the reasons therefore, or the right to appeal any adverse determination. Defendant also failed to invoke the provisions set forth in 5 U.S.C. §552(a)(6)(B) for extending the time limit to respond to the request.

9. On September 30, 2008, the Office of Pollution Prevention and Toxics sent an e-mail to the Plaintiff stating that “An extension of the time required to comply with your request is necessary” and “An initial determination is expected by October 21, 2008.”

10. On October 22, 2008, the Office of Pollution Prevention and Toxics provided limited information confirming the presence of polychlorinated biphenyls (PCBs) in regulated concentrations on board the LIBERTY SHIP ARTHUR M. HUDDALL. The limited document production failed to address the remediation, treatment and/or disposal of PCBs. The limited document production also failed to provide how the Defendant satisfied its stewardship responsibilities under the Toxic Substances Control Act (TSCA).

11. Specifically, since the EPA had knowledge that the LIBERTY SHIP ARTHUR M. HUDDALL had PCBs in regulated concentrations, and since the EPA also knew that the vessel was to be exported to Greece, EPA had a duty under TSCA to ensure that the PCBs were remediated (*i.e.*, removed or brought below regulated concentrations) or to provide a waiver.

12. The waiver procedure takes many months, requires publication in the Federal Register, and would have required a period for public comment. None of these waiver-related activities occurred with respect to the export of the HUDDALL to Greece.

13. Accordingly, only three possibilities exist: (a) the PCBs were remediated or (b) HUDDALL received a waiver from EPA without undergoing the required waiver procedure, or (c) EPA allowed HUDDALL to be exported to Greece without either remediation or a waiver.

14. On October 28, 2008, the EPA’s Office of Enforcement and Compliance Assurance (OECA) sent the Plaintiff a facsimile containing a total of four (4) redacted pages which further failed to address the remediation, treatment and/or disposal of PCBs. The sum total of the

limited document production, even with the additional 4 pages, failed to provide how the Defendant satisfied its stewardship responsibilities under TSCA.

15. On October 28, 2008, the Plaintiff wrote to the Defendant advising that it was dissatisfied with the Defendant's response and redactions, requested additional searches, objected to the untimely responses and reserved its right to seek immediate judicial review.

16. On or about November 4, 2008, Plaintiff was advised that no additional searches would be conducted and no additional records would be forthcoming. On November 19, 2008, Plaintiff formally filed an administrative appeal with the Defendant.

17. As of February 2, 2009, Plaintiff has received no response from the Defendant's Region 3 office in Philadelphia, Pennsylvania or any other field office(s) or other office(s) of the Defendant which supervised, monitored and/or managed Defendant's TSCA stewardship responsibilities.

18. FOIA requires that Defendant issue a final determination resolving an appeal within twenty business days from the date of its receipt. U.S.C. §552(a)(6)(A)(ii). This deadline has also lapsed, and as of the date this complaint was filed there has been no determination of Plaintiff's administrative appeal, nor has Defendant made any request for additional time to determine the appeal.

19. Because Defendant failed to comply with the time limits set forth in 5 U.S.C. §552(a)(6)(A) or extend the time limits pursuant to 5 U.S.C. §552(a)(6)(B), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to its August 22, 2008 FOIA request, pursuant to 5 U.S.C. §552(a)(6)(C).

20. Plaintiff has been required to expend costs and to obtain the services of legal counsel to prosecute this action.

**COUNT 1**  
**(Violation of FOIA)**

21. Plaintiff realleges paragraphs 1 through 20 as if fully stated herein.

22. Defendant has violated FOIA by failing to produce any and all non-exempt records responsive to Plaintiff's August 22, 2008 request within the twenty (20) day time period as required by 5 U.S.C. §552(a)(6)(A)(i) and by failing to demonstrate that any withheld records responsive to this request are exempt from production.

23. Plaintiff has a statutory right to have Defendants process its FOIA request and appeal in a manner which complies with FOIA and Defendant waived its sovereign immunity as to actions brought to gain access to certain records under FOIA.

24. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

25. Plaintiff is entitled to reasonable costs of litigation, including attorneys' fees and costs pursuant to FOIA. 5 U.S.C. §552(a)(4)(E).

**WHEREFORE**, Plaintiff Potomac Navigation, Inc. respectfully requests that the Court:

(1) declare Defendant's failure to comply with FOIA to be unlawful;

(2) enjoin Defendant from continuing to withhold records responsive to Plaintiff's August 22, 2008 FOIA request;

(3) order Defendant to produce all responsive records not subject to claims of exemption;

(4) order Defendant to produce a *Vaughn* index of allegedly exempt records by a date certain;

(5) award Plaintiff attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

(6) grant such other relief as the Court deems just and proper.

/s/

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